IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 596 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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LALJI KAHARAJI BANGA

Versus

STATE OF GUJARAT

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Appearance:
MRS SHILPA J UNWALLA for Petitioners
MR KT DAVE, APP, for Respondent No. 1

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CORAM : MISS JUSTICE R.M.DOSHIT
and
MR.JUSTICE A.L.DAVE

Date of decision: 27/11/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. The appellants herein came to be convicted by learned Additional Sessions Judge, Sabarkantha, at Himatnagar, for offences punishable under Section 302 read with Section 34 and Section 506(2) of Indian Penal Code in respect of an incident that occurred at about 10.00 P.M. on February 20, 1991 in the outskirts of village Maheru of Bhiloda taluka of Sabarkantha district, wherein one Mehaji Thavaraji lost his life.

2. A First Information Report came to be lodged with Bhiloda Police Station by one Shankerbhai Galjibhai on the 21st February, 1991 (Ex.10), stating that, on the previous day, i.e. on the 20th February, 1991, at about 10.00 P.M., when he was at home, he heard shouts of Meha Thavara seeking help. He, therefore, along with his brother Sagaram Nanji and Dinesh Galji rushed towards the place wherefrom the shouts had come. They saw accused-Lalji with an axe in his hand, accused-Kamji Kahara with stones in his hand and accused-Kahara Thavara with a stick in his hand. They also saw Meha Thavara lying there in a bleeding condition raising shouts. When they went nearer, the accused Lalji Kahara asked them to keep away and if they did not keep away, they would be treated the same way as Maha Thavra. Thereafter, Kamji Kahara and Kahara Thavara went towards their house. The deceased was bleeding from his head injury which was caused with an axe. His hand was fractured and, on being asked, he said that Lalji Kahara had given an axe blow on his head, Kahara Thavara had fractured his hand by giving stick blow and Kamji Kahara had pelted stones at him. The witness along with Sagaram Nanji carried the deceased home. On further inquiry, the deceased informed that the accused persons had assaulted to snatch away survey No.259. According to the complainant, thereafter, they treated the deceased with hot fermentation on his back. They could not take the deceased to the hospital for want of conveyance. The deceased succumbed to the injuries at about 12.00 midnight. The complaint could not be lodged immediately because of fear of the accused persons. Next morning, when the community people gathered, the complainant went to the police for lodging the complaint.

2.1 On basis of the above F.I.R., the offence was registered and the police started investigation. Panchnama of the place of the incident was drawn, inquest report was prepared, postmortem of the dead body was also performed, statements of witnesses were recorded and, after considering, the evidence collected, the investigating agency found sufficient evidence to connect the accused persons with the offence and, therefore, a charge sheet was filed in the Court of learned Judicial

Magistrate, First Class, at Himatnagar. Criminal Case No.361 of 1991 was registered in that Court. Since the offences with which the accused persons were charged were exclusively triable by a Court of Sessions, the case came to be committed to the Court of Sessions at Himatnagar and was rgistered as Sessions case No.53 of 1991.

2.2 Charge was framed against the accused persons at Ex.3 for the offence punishable under Section 302 read with Section 34 of I.P.C. and Section 506(2) of I.P.C. All the accused persons pleaded not guilty to the charge. The trial was, therefore, conducted against them. At the end of the trial, statements of the accused persons, as required under Section 313 of the Code of Criminal Procedure, were recorded, affording an opportunity to the accused persons to explain the evidence against them.

2.3 After considering the evidence led by the prosecution and the contentions raised by both the sides, the learned Additional Sessions Judge came to a conclusion that the prosecution had successfully proved the charges levelled against the accused persons and he, therefore, convicted all the accused persons for the offences with which they were charged. After hearing all the accused persons on question of sentence, the learned Additional Sessions Judge imposed life imprisonment and a fine of Rs.100/- on all the accused persons for the offence punishable under Section 302 read with Section 34 of I.P.C. and directed to undergo rigorous imprisonment for a period of one month in case of default in payment of fine. All the accused persons were also sentenced to undergo rigorous imprisonment for a period of six months with fine of Rs.50/- for the offence punishable under Section 506(2) of I.P.C. and were directed to undergo rigorous imprisonment for 15 days in case of default in payment of fine. It was also directed that the principal sentences shall run concurrently. The muddamal was directed to be destroyed after the appeal period was over.

2.4 Aggrieved by the said judgment and order, all the accused have preferred this appeal praying for quashing and setting aside the judgment and order passed in Sessions Case No.53 of 1991 on 20.06.1992 and convicting the accused persons/appellants of the charges levelled against them.

3. Mrs. Unwalla, appearing for the appellant, has taken us through the entire record and proceedings. There were three folds to her arguments. The first was that the Court below has committed an error in convicting

the accused persons of the charges levelled against them. In fact, the prosecution has failed to prove the charges against the accused persons. In order to support her say, she has drawn our attention to the fact that nobody has witnessed the incident. There was darkness at the time when the incident occurred and the complainant and the other witnesses who claim to have rushed to the place of incident and who claim to have seen the accused persons running away could not have seen the incident due to darkness. She also submitted that as as the place of incident and the place from which the witnesses claim to have heard the shouts are at such a distance that they could not have heard the shouts. She submitted that the accused persons would not have waited there for the complainant and other witnesses to come and see them running away with the weapons. The story advanced by the prosecution witnesses is, therefore, not believable. she submitted that, despite this, the Court below has accepted the prosecution version.

3.1 The second fold of argument is that accused No.3 is charged to have caused the injuries by pelting stones. There is no specific injury attributed either to him or to the weapon that he is alleged to have used, namely, stones. She submitted further that there is nothing to indicate use of any stones either. Barring this, there is no evidence to connect him with the offence. She, therefore, urged, accused-appellant No.3 may be acquitted of the charges levelled against him and for which he is convicted.

3.2 Mrs. Unwalla submitted that, so far as accused Nos.1 and 2 are concerned, according to the medical evidence, the fatal injury was not the injury with axe on the head. Accused No.2 is charged to have caused injury with a stick. Medical evidence is that the fatal injury on back of the deceased was caused with a hard and blunt substance. Prosecution witness No.1 (complainant) has improved his version in his deposition by stating that the injury on back of the deceased was caused with the hind portion of the axe. This version is not found in the F.I.R. She, therefore, urged that even against accused Nos.1 and 2, the evidence is doubtful and even if that weak evidence is accepted, they could not have been convicted for murder. In order to support her argument, she has stated that the fatal injury is caused on a non-vital part of the body, namely, back and that the injury is caused with the hind portion of the axe or with a stick regarding which there is no evidence and, therefore, the intention could not have been of causing death of the deceased. She submitted that there must

have been some quarrel since accused No.1 has sustained injuries on his person in the same transaction. Therefore, at the most, the case would fall within the definition of "culpable homicide not amounting to murder" punishable under Section 304 of I.P.C. She, therefore, urged that the appeal may be allowed.

4. Mr. K.T. Dave, learned Additional Public Prosecutor contesting the appeal on behalf of the respondent-State, submitted that all the three persons have gone together to the field of the deceased. The incident has taken place at night, at a time when they had no justifiable reason to be there and, therefore, the Trial Court has rightly applied Section 34 while convicting them for the offence of murder. Mr. Dave submitted that serious injuries have been caused on person of the deceased by all the appellants and, therefore, it was not necessary for the prosecution to prove as to which of the accused caused which injury. In light of the evidence on record, he submitted that the Trial Court has properly appreciated the evidence and this Court may not interfere with that judgment and order of conviction wherein a man has been done to death deliberately and with premeditation. He, therefore, urged that the appeal may be dismissed.

5. We have gone through the evidence on record. We find that, although accused-Kamji Kaharaji, appellant No.3 herein, is charged to have caused injuries by pelting stones, there is no evidence to indicate his active participation in the incident. According to witness-Shanker Galji, he had seen appellant No.3 with stones in his hand and that he had also seen stones lying at the place of the incident. Against this, if Panchnama of the place of incident (Ex.32) is seen, there is no reference to any stones lying at the place of incident. The Panchnama records that the place is dusty and there are foot prints. The Panchnama was drawn between 12.30 P.M. and 1.30 P.M. on the 21st February, 2000, i.e., soon after lodging of the F.I.R. Presence of foot prints on a dusty place indicates that there was no change after the incident occurred and factum of absence of stones, therefore, assumes importance.

5.1 Considering that there is absence of stones at the place of the incident, considering that there is no medical evidence to indicate any injury having been caused with stones, and further considering that accused No.1 has sustained injuries on his person in this very transaction indicating possibility of quarrel, we feel that it is a risky proposition to accept that accused

No.3 shared a common intention of causing death of the deceased with the other two accused persons. He, therefore, could not have been convicted under Section 302 read with 34 of I.P.C. No injury is caused by him, no participation beyond reasonable doubt is indicated and, therefore, we are inclined to accept the arguments advanced by Mrs. Unwalla in respect of accused No.3. Appeal of appellant No.3, therefore, will have to be allowed to that extent. His conviction under Section 302 read with Section 34 will have to be quashed and set aside.

6. So far as the appeal of appellants No.1 and 2 is concerned, we do not find much force in the arguments advanced by Mrs. Unwalla that they could not have been convicted at all. There is ample evidence on record to indicate involvement of accused Nos. 1 and 2 in the incident. The involvement is indicated even by injuries sustained by accused No.1 in the course of transaction of the same incident. He has also lodged F.I.R. in this regard (Ex.44). Besides this, the complainant and other witnesses who reached the place of incident soon after the incident have seen appellants No.1 and 2 at the place with their respective weapons in their hands. There also is oral dying declaration of the deceased before complainant (P.W.I) Shankerbhai Galjibhai. There is no reason to disbelieve these natural witnesses. The argument that these witnesses could not have heard the shouts of the deceased does not inspire any confidence. The cross-examination of these witnesses on this count, if examined, indicates that distance between the place of incident and the house of the complainant can be covered within three minutes on foot and, in our opinion, it is not impossible to hear such shouts raised for rescue in desperation at quiet hours of 10.00 in the night in a small village free from other noisy hassles and, therefore, we uphold the finding of the Trial Court regarding involvement of accused-appellants No. 1 and 2 in the incident.

7. However, considering the medical evidence on record, it is clear that the death was caused due to haemorrhagic shock as a result of injury to vital organ both the lungs. These injuries to lungs are correlated to external injury No.2, which indicates reddish bruice in the back of lower chest obliquely directed. Corresponding internal injury is fracture of ribs and pleural rupture which, ultimately, caused the death. Considering the nature of injury and the nature of weapon, we find truth in the version of the complainant that the injury was caused with the hind portion of the

axe. If it was with the front portion of the axe with such force, the injury would have been of a different nature or definitely it would not have been a bruice injury. It is true that the F.I.R. is not specific about injury with hind portion of axe, but that omission, in facts of this case, considering other evidence, cannot be considered as material omission good enough to be fatal to prosecution case.

7.1 In view of this evidence, we feel that there is substance in the argument advanced on behalf of the appellants that, if the intention of the accused persons was to kill, the front portion of the axe would have been used. In our opinion, the fact that a non-vital portion of the body, namely, lower back, is assaulted upon with the hind portion of the axe may be indicative of possibility of lack of intention to kill. At the same time, the impact of the injury is such (fracture of multiple ribs and rupture of lungs) which would indicate that the blow was given with a great force. It leads to a necessary inference of intention to kill, if it is considered in light of the fact that the deceased was also caused serious injuries on head and fracture of hand. Both accused No.1 and 2 were armed with weapons. Both have actively participated in the assault since there is evidence to indicate that accused No.2 had caused fracture injuries by giving stick blows. In our opinion, they can be convicted for culpable homicide not amounting to murder punishable under Section 304 First Part. The appeal of appellants No.1 and 2, therefore, can be allowed to that extent by converting the conviction under Section 302 read with Section 34 to one under Section 304 First Part read with Section 34 of I.P.C.

8. So far as conviction under Section 506(2) of I.P.C. is concerned, there is consistent evidence of three witnesses who clearly say that they were intimidated by all the three accused persons when they reached the place of incident. We do not find any error in the judgment and order recording conviction of the appellants for the offence punishable under Section 306(2) of I.P.C. and we do not intend to interfere either with the conviction or with the sentence qua this Section.

9. In view of the foregoing discussion, the appeal is partly allowed.

9.1 The conviction of appellant No.3 for offence punishable under Section 302 read with Section 34 of

I.P.C. is set aside.

9.2 The conviction of appellants No.1 and 2 for offence punishable under Section 302 read with Section 34 of I.P.C. is quashed and set aside and, instead, they are convicted for offence punishable under Section 304 First Part read with Section 34 of I.P.C. and are sentenced to undergo rigorous imprisonment for a period of 10 years. The sentence of fine is not disturbed.

9.3 Conviction of all the three appellants under Section 506(2) of I.P.C. and punishment therefor is hereby confirmed. The order regarding disposal of muddamal is also confirmed. Sentences to run concurrently.

[ MISS R.M. DOSHIT, J. ]

[ A.L. DAVE, J. ]

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